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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARSHA LANE JEWELL,

Plaintiff and Appellant,

v.

BARCLAYS CAPITAL REAL ESTATE,  
INC., et al.,

Defendants and Respondents.

A144588

(Contra Costa County  
Super. Ct. No. CIVMSC10-01534)

Plaintiff Marsha Lane Jewell brought this action against Barclays Capital Real Estate, Inc. doing business as HomEq Servicing (HomEq), Ocwen Loan Servicing, LLC, and Deutsche Bank National Trust Company (collectively defendants) to challenge foreclosure proceedings instituted against her home. Plaintiff, appearing in propria persona, now appeals the trial court's orders (1) denying her motion to file an amended complaint, (2) denying her application to file an untimely opposition to defendants' motion for summary judgment, (3) granting defendants' motion for summary judgment, and (4) denying her request for a jury trial. We affirm in part and reverse in part.

**I. BACKGROUND**

In December 2005, plaintiff took out an adjustable rate loan for \$315,000, secured by a deed of trust on her Concord residence (the subject property). Plaintiff's interest rate started at 7.9 percent, but could increase to up to 14.9 percent under the terms of the loan. Plaintiff alleges that, in March 2008, her income was reduced "due to recessionary cuts," while her interest rate increased to 10.9 percent. According to plaintiff, her monthly

payments increased by \$600 to \$2,755. Plaintiff did not make any mortgage payments from March through December 2008.

In December 2008, upon plaintiff's request, HomeEq proposed a loan modification to avoid foreclosure. The December proposal required plaintiff to make an \$8,000 "down payment." Plaintiff and HomeEq executed a loan modification agreement (LMA) in February 2009. The February LMA states the unpaid principal balance will increase from \$298,272.05 to \$328,580.87, to reflect the amount of unpaid interest, late charges, fees, and costs. It also states plaintiff's monthly interest rate would be reduced to 5 percent for a period of five years, after which it would revert to the rate set forth in the original note. Plaintiff's new monthly payments would be \$1,624.43, excluding "additional amounts which may also be due for the payment of taxes and insurance premiums."

HomeEq claims it mistakenly sent the executed LMA to plaintiff prior to final approval by its loan maintenance department. HomeEq also claims that in March 2009, after all parties had agreed to the LMA, its loan modification department rejected the agreement because not all arrears owed had been capitalized into the principal loan balance. In May 2009, HomeEq mailed plaintiff a new loan modification proposal. This proposal required plaintiff to make an initial downpayment of \$17,718.61, but it reduced plaintiff's interest rate to 4 percent.<sup>1</sup> Under the proposal, plaintiff's principal balance would have increased to \$344,657.84, and her monthly payments would have been \$1,845.56. HomeEq asserts the terms of the May proposal were more favorable than those of the December proposal and reduced plaintiff's total monthly payments.

HomeEq claims it "provided notice" the February LMA was rescinded due to error, though we can find no evidence of this in the record. The May 22, 2009 letter setting forth the modification proposal says nothing about a rescission. The only other evidence to which HomeEq points is a May 21, 2009 "comment note," which appears to reflect a

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<sup>1</sup> HomeEq now asserts the May proposal would have fixed Jewell's interest rate at 4 percent for the life of the loan. But the portions of the record on which HomeEq relies does not reflect this term.

phone conversation with plaintiff. The notes states: “mod[ification] [followup] need to adv[ise] borrower resubmitted th[e] mod[ification] there w[a]s error on prev[ious] mod[ification] need to send new mod[ification] agreement.” According to HomEq, plaintiff refused to agree to the May proposal and continued to make payments in the amount required under the February LMA. Neither the February LMA nor the loan modification proposed in May were entered into HomEq’s system, and plaintiff’s account continued to accrue based on the terms of the original loan.

In August 2009, HomEq advised plaintiff that she was in default. In September 2009, Quality Loan Service Corp. (QLS) recorded a notice of default, and in January 2010, it recorded a notice of trustee sale. Plaintiff disputed the default, and QLS postponed the sale. In September 2010, the servicing rights for the loan were transferred to Ocwen Loan Servicing, LLC. In or around January 2011, the subject property was sold via trustee sale for \$383,818.10. The sale was subsequently rescinded.

Plaintiff filed the instant action in May 2010, and filed a second amended complaint in October 2013, asserting 15 causes of action. Defendants demurred to the second amended complaint, and the trial court sustained the demurrer without leave to amend as to nine of plaintiff’s claims. The remaining claims were for fraud and deceit, breach of contract, unfair business practices in violation of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.; UCL), wrongful foreclosure, declaratory relief, slander of title, and violation of the Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.).

On June 27, 2014, defendants filed a motion for summary judgment, and a hearing date was set for September 15, 2014. On July 10, 2014, plaintiff filed an ex parte motion to deny defendants’ motion for summary judgment, based on improper and untimely service. That motion was denied on July 23. On September 8, 2014, the court converted the case to a court trial because plaintiff had failed to pay the required jury fees. On that same day, plaintiff filed an ex parte motion for leave to file an untimely opposition to defendants’ motion for summary judgment. Plaintiff’s opposition consisted of a “separate statement” along with numerous documents which she appears to have

annotated herself. Plaintiff failed to file declarations authenticating her supporting documents or a memorandum of points and authorities. On September 8, plaintiff also filed an ex parte application for leave to file a third amended complaint. The motion was denied that same day.

The court heard arguments on the remaining motions on September 15, 2014, though there is no reporter's transcript of that proceeding. On October 1, 2014, the trial court granted defendants' motion for summary judgment, finding defendants had adequately established the absence of triable issues as to all remaining causes of action. The trial court also denied plaintiff's ex parte motion to file an untimely opposition.

## **II. DISCUSSION**

### **A. *Ex Parte Application to Amend the Complaint***

Plaintiff argues the trial court erred in denying her ex parte application to amend her pleadings.<sup>2</sup> We disagree. "An appellate court will not interfere with the denial of a motion to amend unless an abuse of discretion is manifest." (*American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 880.) No such abuse of discretion appears in this case.

"Leave to amend may be denied if there is prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation." (*Kolani v. Gluska*

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<sup>2</sup> Defendants argue we lack jurisdiction to consider this argument because plaintiff failed to specify the order denying the motion for leave in her notice of appeal. We disagree. A notice of appeal must be liberally construed, and the notice is sufficient if it identifies the particular judgment or order being appealed. (Cal. Rules of Court, rule 8.100(a)(2).) We must resolve all ambiguities in favor of the validity of the notice. (See *Estate of Smead* (1932) 215 Cal. 439, 441.) Thus, a notice specifying one appealable order is construed to include related orders. (*Creed v. Schultz* (1983) 148 Cal.App.3d 733, 736.) Here, plaintiff's notice of appeal states she is appealing from "Judgment after an order granting a summary judgment motion." We liberally construe this to mean plaintiff is also appealing the interim order denying her motion to file a third amended complaint, which opened the door for the trial court to consider the motion for summary judgment. For similar reasons, we reject defendants' argument that plaintiff's notice of appeal does not encompass the trial court's order converting her cause to a court trial.

(1998) 64 Cal.App.4th 402, 412.) Here, plaintiff filed the motion for leave on September 8, while the hearing on the motion for summary judgment was scheduled for September 15, and the trial was set for October 14. Thus, granting leave to amend would have delayed the trial and increased discovery costs. Moreover, plaintiff concedes she discovered the facts underlying her new claims sometime between January and March 2014, months before she moved for leave to amend. Plaintiff has yet to explain why she waited until the 11th hour to try to amend her complaint.

**B. *Ex Parte Application to File An Untimely Opposition***

It appears plaintiff is attempting to challenge the trial court's order denying her ex parte motion to file an untimely opposition to defendants' motion for summary judgment, as plaintiff's appellate briefing relies on much of the opposition evidence she attempted to introduce below. We conclude the trial court did not abuse its discretion in denying this ex parte motion. Plaintiff failed to show good cause for granting such relief. Her opposition was filed only a week before the scheduled hearing on the motion for summary judgment. Even if plaintiff had shown good cause, as the trial court held, the only proposed opposition submitted consisted of "a confusing and argumentative separate statement that is not supported by opposition evidence or an opposition memorandum of points and authorities." Additionally, plaintiff's evidence was not authenticated and thus inadmissible. While we recognize plaintiff was representing herself pro. per., she still had a responsibility to abide by court deadlines, the rules of evidence, and the basic rules of procedure.

**C. *Motion for Summary Judgment***

Although plaintiff failed to file an opposition to defendants' motion for summary judgment, defendants still needed to meet their initial burden of proof before the trial court granted summary judgment. (See *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085.) Moreover, we have discretion to consider arguments raised for the first time on appeal "when it is purely a matter of applying the law to undisputed facts." (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) We conclude defendants failed to meet their burden as to plaintiff's claims for breach of contract, violation of the

UCL, and declaratory relief.<sup>3</sup> Each of these claims is predicated on the theory defendants initiated foreclosure proceedings, even though plaintiff had satisfied her obligations under the February LMA. Defendants' contention that HomEq somehow unilaterally rescinded the February LMA is unavailing.<sup>4</sup>

### **1. Standard of Review**

We review the trial court's decision to grant defendants' motion for summary judgment de novo. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Summary judgment must be granted if all the papers and affidavits submitted, together with "all inferences reasonably deducible from the evidence" and uncontradicted by other inferences or evidence, show that "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Where, as here, the defendant is the moving party, he or she may meet the burden of showing that a cause of action has no merit by proving that one or more elements of the cause of action cannot be established. (See *id.*, § 437c, subd. (o).) Once the defendant has met that burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583.) On appeal, "[w]e may consider only those facts which were before the trial court, and disregard any new factual allegations made for the first time on appeal." (*Sangster v. Paetkau*, at p. 163.)

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<sup>3</sup> Plaintiff has not specifically addressed whether there are triable issues for her other claims for relief. Neither do we.

<sup>4</sup> Plaintiff also argues summary judgment should have been denied because defendants failed to properly notice their motion and because the hearing on the motion was improperly set within 30 days of the scheduled trial date. We need not consider the arguments because they were raised for the first time on reply. In any event, the trial court found plaintiff had been served with the motion by mail within 80 days of the hearing date in compliance with Code of Civil Procedure section 437c, and plaintiff has pointed to nothing in the record which would suggest this ruling was in error. Moreover, the issue of the hearing being set within 30 days of the trial date was not clearly raised in plaintiff's ex parte motion below. Nor can we find plaintiff was prejudiced because the hearing on the motion for summary judgment was held 29 days before the scheduled trial date, especially since no trial was actually held.

## **2. Breach of Contract**

In her breach of contract claim, plaintiff alleges HomEq proposed a loan modification in December 2008, the parties agreed to the proposed modification in February 2009, plaintiff satisfied her obligations under the February LMA, and defendants breached the agreement by failing to properly apply plaintiff's payments to her mortgage loan. In their motion for summary judgment, defendants argued the December proposal was rescinded due to defendants' mistake; plaintiff did not suffer any damage as a result of the alleged breach; and plaintiff failed to mitigate her damages. Defendants failed to meet their burden as to all of these arguments.

As to their first argument, defendants asserted the February LMA was rescinded because they mistakenly failed to include all amounts due and owing into plaintiff's new principal balance. It is unclear from defendants' motion why they made such a mistake. In their appellate briefing, defendants state the error in the price term was result of the time lag between the December 2008 proposal and the execution of the February LMA. In defendants' words: "Because the December Proposal was not submitted for processing until late February/early March 2009, the terms were stale and should have been updated." Defendants' motion also asserted the capitalization of all past due arrears was a basic assumption of the February LMA.

Where, as here, a plaintiff has no reason to know and does not cause a defendant's unilateral mistake of fact, the defendant must establish the following to obtain a rescission: "(1) the defendant made a mistake regarding a basic assumption upon which the defendant made the contract; (2) the mistake has a material effect upon the agreed exchange of performances that is adverse to the defendant; (3) the defendant does not bear the risk of the mistake; and (4) the effect of the mistake is such that enforcement of the contract would be unconscionable." (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 282.) Setting aside whether defendants satisfied the first three elements, they made no attempt below to establish their mistake regarding the principal balance rendered the February LMA unconscionable. The issue is not even discussed in defendants' motion for summary judgment.

In their appellate briefing, defendants argue the February LMA was unconscionable because it required them to waive over \$15,000 in overdue payments. But even considering this waiver, it appears defendants still stood to make a considerable profit from the loan. The February LMA increased plaintiff's principal balance from \$298,272.05 to \$328,580.87, over \$13,000 higher than the original principal balance of \$315,000. It appears much of this increase was due to missed interest payments. As discussed above, under the original terms of the loan, plaintiff's interest rate started at 7.9 percent and was later raised to 10.9 percent. And under the terms of the February LMA, the interest rate could eventually rise to as high as 14.9 percent. Based on this record, it strains credulity to suggest the February LMA imposed unconscionable terms on defendants. Defendants' contentions regarding the unconscionability of the February LMA are further undercut by their admission that they later knowingly offered plaintiff an even more favorable loan modification in May 2009.

The two other arguments raised in defendants' motion for summary judgment are also unpersuasive. Defendants asserted plaintiff did not suffer any damages as a result of the alleged breach because plaintiff failed to satisfy her obligations under the February LMA as she had not made any payments on her loan since October 2009. However, plaintiff did make the required payments under the February LMA for nine months, and there appears to be a triable issue as to whether she had an obligation to continue doing so after defendants disclaimed the agreement. In September 2009, despite the fact that plaintiff had satisfied her obligations under the February LMA, defendants recorded a notice of default. Defendants are essentially arguing that, while they foreclosed on her home, plaintiff should have continued making payments pursuant to the terms of an agreement they refused to recognize.

In their summary judgment motion, defendants also asserted plaintiff could not prevail because she failed to mitigate her damages from the breach. Defendants reasoned plaintiff could have mitigated her damages by accepting their May 2009 proposal to further modify the loan. According to defendants, this proposal was even more favorable to plaintiff because it reduced her interest rate to 4 percent and her total monthly



payments to \$1,845. The argument presupposes defendants could unilaterally rescind the February LMA so long as they offered plaintiff an alternative agreement. That is not how contracts work. While HomEq was certainly free to propose another loan modification, plaintiff was under no obligation to accept it. Even if plaintiff's decision to reject the May modification proposal was unwise, she was still entitled to rely on the terms of the parties' preexisting agreement. Moreover, defendants' contention that the May proposal was better for plaintiff than the existing agreement is dubious, especially since it required plaintiff to make an additional upfront payment of \$17,718.61.<sup>5</sup> It is unclear from the record whether plaintiff even had the means to make such a payment. Accordingly, there is at least a triable issue as to whether plaintiff failed to mitigate her damages. In any event, to the extent plaintiff failed to take reasonable mitigation measures, that would merely limit her recovery.

For these reasons, we find defendants failed to meet their initial burden and the trial court erred in granting summary judgment as to plaintiff's claim for breach of contract.

### **3. UCL**

Plaintiff's claim for violation of the UCL is predicated, at least in part, on defendants' failure to honor the February LMA. In their motion for summary judgment, defendants argued the UCL claim failed because the February LMA was rescinded and they attempted to offer plaintiff a new modification in May 2009. As discussed above, we find these arguments unpersuasive. Accordingly, defendants failed to meet their initial burden on the UCL claim. The trial court's decision to grant summary judgment on the UCL claim was error.

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<sup>5</sup> At oral argument, HomEq's counsel argued plaintiff did not need to make an additional upfront payment because of various credits to her account. But HomEq's May 22, 2009 letter describing the proposed loan modification expressly states plaintiff was required to deliver a cashier's check for \$17,718.61, in order to accept the proposal. While the term sheet attached to the letter vaguely references \$17,713.61 in credits, it is entirely unclear how these credits were to be applied.

#### **4. Declaratory Relief**

In her claim for declaratory relief, plaintiff sought a declaration of the validity of the February LMA. Defendants argued this claim failed because it was merely a recitation of her other defective causes of action. As discussed above, we find plaintiff's claims for breach of contract and violation of the UCL should have survived summary judgment. Accordingly, she may proceed with her claim for declaratory relief to the extent it is based on those causes of action.

#### **D. Jury Demand**

Plaintiff argues the trial court erred in refusing to honor her demand for a jury trial. The right to a trial by jury is "inviolable" and "shall be secured to all." (Cal. Const., art. I, § 16.) A party may waive the right to a jury trial by, among other things, failing to timely pay jury fees. (Code Civ. Proc., § 631, subd. (f)(5).) Where, as here, the plaintiff's initial complaint was filed before July 1, 2011, and the initial case management conference occurred before June 28, 2012, jury fees were due at least 25 calendar days before the date initially set for trial. (*Id.*, § 631, subd. (c)(3).)

Here, the jury trial was initially set for March 10, 2014, and plaintiff failed to post her jury fees before that date. Nevertheless, the trial court had the discretion to permit a jury trial despite plaintiff's failure to post fees. (Code Civ. Proc., § 631, subd. (g).) Further, a trial court should grant a motion to be relieved of a jury waiver "unless, and except, where granting such a motion would work serious hardship to the objecting party." (*Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 809.) When there is doubt concerning the propriety of granting relief from a waiver, the doubt should be resolved in favor of the party seeking a trial by jury. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 956.) The court abuses its discretion if it denies relief when there has been no prejudice to the other party or the court from an inadvertent waiver. (*Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638.)

Based on this slim record, we cannot determine whether or not the trial court abused its discretion. Plaintiff has elected to proceed without a reporter's transcript so it is unclear if the trial court found prejudice when it converted the case to a court trial.

Moreover, we cannot assume there was an abuse of discretion based solely on plaintiff's unsupported account of the hearing in her appellate briefing. Accordingly, we decline to reverse the trial court's order converting the case to a court trial.<sup>6</sup>

### **III. DISPOSITION**

The trial court's order granting defendants' motion for summary judgment is reversed as to plaintiff's claims for breach of contract, violation of the UCL, and declaratory relief. It is affirmed in all other respects. We remand for further proceedings consistent with this opinion. Plaintiff shall recover her costs on appeal.

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Margulies, J.

We concur:

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Humes, P.J.

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Dondero, J.

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<sup>6</sup> As a new trial date will need to be set on remand, nothing in this opinion precludes plaintiff from reasserting her jury demand. Nor does the opinion preclude the trial court from reevaluating the prejudice posed by such a demand.